

Filed 1/25/19 In re Emmanuel A. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re EMMANUEL A., et al.,
Persons Coming Under the
Juvenile Court Law.

B288684

(Los Angeles County
Super. Ct. No.
17CCJP02670)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

VICTOR A.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles
County. Martha Matthews, Judge. Affirmed.

Jacques Alexander Love, under appointment by the California Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

* * * * *

A juvenile court exerted dependency jurisdiction over an 18-month-old and a three-month-old after their parents admitted that they had engaged in domestic violence and the court concluded that father had a history of substance abuse. Father challenges the court's jurisdictional finding regarding substance abuse, its order removing the children from his care, and its dispositional orders requiring him to drug test and attend counseling regarding substance abuse.¹ We conclude that substantial evidence supports the jurisdictional finding father attacks, the court's removal order, and its case plan-related orders. We accordingly affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Victor A., Sr. (father) and Cramin L. (mother) have two children together: (1) Emmanuel A., who was born in August 2016, and (2) Jesus A., who was born in November 2017.²

¹ Father also challenged the court's order requiring his visitation be monitored, but the juvenile court subsequently amended its order to allow for unmonitored visitation, thereby rendering this particular challenge moot.

² Mother has two other children with two other men. However, the juvenile dependency allegations involving those other children are not before us in this appeal.

Mother and father have a tumultuous relationship. In November 2013, father bit mother on the chest, choked her and dragged her across the ground. In April 2017, and while mother was pregnant with Jesus, mother and father got into a verbal argument about mother's fidelity that ended when mother threw a knife across the room and it shattered a television. Mother's firstborn child, then age seven, with another man, was in the room during the April 2017 incident.

Father has smoked marijuana his entire adult life. He described his daily routine: "I work all day . . . I roll a blunt. I smoke. I call [mother], ask her to make dinner. I smoke some more. I go inside and eat. I watch T.V. and then I go to sleep." Father summed up: "I'm high all the time." Father would roll his blunts and smoke them in front of the children, even though his seven-year-old stepson would get sick from the smoke. A neighbor reported that father smoked to "excess" with the kids around. Neither Emmanuel nor Jesus had any marks or bruises, however, and were well nourished.

II. Procedural Background

In December 2017, the Los Angeles Department of Children and Family Services (Department) filed a petition asking the juvenile court to exert dependency jurisdiction over Emmanuel and Jesus, among other reasons, because (1) mother and father "have a history of engaging in violent altercations in the . . . presence" of one or more children, thereby placing Emmanuel and Jesus at "substantial risk" of suffering "serious physical harm" inflicted both "nonaccidentally" and due to the parents' "inability to . . . protect the child[ren]" (rendering jurisdiction appropriate under Welfare and Institutions Code section 300, subdivisions (a)

and (b)(1)),³ and (2) father “has a history of substance abuse and is a current abuser of marijuana which renders [him] incapable of providing regular care of the children,” thereby placing Emmanuel and Jesus at “substantial risk” of “serious physical harm” (rendering jurisdiction appropriate under section 300, subdivision (b)(1)).⁴

The juvenile court held the jurisdictional hearing in February 2018. Father and mother each entered no contest pleas to the domestic violence-based allegation under section 300, subdivision (b)(1). After entertaining argument from counsel, the juvenile court also sustained the substance abuse allegation against father. In so doing, the court explained that Emmanuel and Jesus were “ages zero and two,” that “[c]hildren of that age require constant vigilance and supervision,” and that “it’s simply not safe for a custodial parent of very young children to be, as [father says], high all the time.”

A week later, the juvenile court held the dispositional hearing. The court placed both children in the home of mother on the condition that mother live with the paternal aunt, and ordered family maintenance services for mother. The court

³ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

⁴ The Department also alleged that father had physically abused his child from another woman; that mother had a history of substance abuse; and, as noted earlier, several grounds for jurisdiction involving mother’s children by other men. The juvenile court dismissed the first of these two allegations at the jurisdictional hearing, and the others are outside the scope of this appeal.

removed both children from father's custody, and ordered family reunification services for father. As part of father's reunification case plan, the court ordered father to attend individual counseling for substance abuse and its impact on children; to undergo random drug testing; to attend a domestic violence program; and to have monitored visitation with the children until father had "four more [drug] tests either clean or showing consistently decreasing marijuana levels," at which point the Department had discretion to make the visits unmonitored.

Father filed a timely notice of appeal. Mother has not appealed.

DISCUSSION

On appeal, father argues that (1) insufficient evidence supports the juvenile court's finding that his substance abuse placed Emmanuel and Jesus at substantial risk of serious physical harm; (2) insufficient evidence supports removing the children from his custody; and (3) the reunification case plan requirements that father attend drug counseling and drug test lack any evidentiary basis.

I. Jurisdictional Finding

A. *Justiciability*

As a threshold matter, we must decide whether to entertain father's challenge to the juvenile court's jurisdictional finding regarding his substance abuse. Neither father nor mother challenges the jurisdictional finding regarding domestic violence. Because that unchallenged finding is enough by itself to justify the juvenile court's exertion of dependency jurisdiction over Emmanuel and Jesus (see *In re I.A.* (2011) 201 Cal.App.4th 1484, 1491 ["it is necessary only for the court to find that one parent's conduct has created circumstances triggering section 300 for the

court to assert jurisdiction over the child”]), father’s challenge to the substance abuse finding does not call into question the propriety of the court’s exertion of jurisdiction. (*In re Briana V.* (2015) 236 Cal.App.4th 297, 308.)

We nevertheless have discretion to entertain an appeal challenging a jurisdictional finding that does not affect the juvenile court’s jurisdiction if that finding “serves as the basis for dispositional orders that are also challenged on appeal.” (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762 (*Drake M.*)). Here, father challenges the juvenile court’s dispositional case plan orders requiring him to drug test and attend counseling regarding drug abuse. Although a juvenile court has authority to impose any “reasonable order[] for the care, supervision, custody, conduct, maintenance and support of [a dependent] child” regardless of whether there is a specific jurisdictional finding related to that order (§ 362, subd. (a)), the juvenile court’s imposition of substance abuse-related requirements in *this* case appears to be tied to its jurisdictional finding because the court did not impose similar conditions upon mother notwithstanding her marijuana use. We will accordingly exercise our discretion to reach the merits of father’s challenge to the substance abuse jurisdictional finding.

B. Sufficiency of the Evidence

A juvenile court may exert dependency jurisdiction over a child if, among other things, the “child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of . . . the inability of the parent . . . to provide regular care for the child due to the parent’s . . . substance abuse.” When this allegation is at issue, courts employ a “tender years” presumption; under that presumption, a “finding

of substance abuse is prima facie evidence of the inability of a parent . . . to provide regular care resulting in a substantial risk of physical harm.” (*Drake M.*, *supra*, 211 Cal.App.4th at p. 767; *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1385.) In such cases, jurisdiction is appropriate even in the absence of proof of an “identified, specific hazard in the child’s environment.” (*Drake M.*, at pp. 766-767, italics omitted.)

Father does not challenge the juvenile court’s finding that he is a substance abuser; instead, he argues that there is insufficient evidence that his abuse of marijuana puts Emmanuel and Jesus at substantial risk of serious physical harm. Our review of the court’s risk finding is limited; we ask only whether it is supported by evidence that is ““reasonable, credible, and of solid value,”” and do so while viewing that evidence in the light most favorable to the juvenile court’s finding. (*In re F.S.* (2016) 243 Cal.App.4th 799, 811-812.)

Viewed in the light most favorable to the juvenile court’s finding of risk, substantial evidence supports the court’s finding. Emmanuel and Jesus were 18 months and 3 months old at the time of the jurisdictional hearing (and are now both under the age of three), so both are of tender years. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1219 [children six years old or younger are considered children of “tender years”].) Because father’s marijuana abuse is unchallenged and because the boys are children of tender years, the presumption that a parent’s substance abuse puts children of tender years at risk of harm applies and constitutes sufficient evidence to support the juvenile court’s jurisdictional finding on this ground. (*Drake M.*, *supra*, 211 Cal.App.4th at p. 767 [where child is of tender years, the Department “need[] only . . . produce sufficient evidence that

father was a substance abuser in order for dependency jurisdiction to be properly found”].)

Father levels two challenges to this analysis.

First, he asserts that his lawful use of marijuana does not by itself justify the exertion of dependency jurisdiction (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 452 [“the mere use of marijuana by a parent will not support a finding of risk to minors”]), especially where the children are healthy and unharmed (and any risk of harm is therefore speculative) (*In re H.G.* (2006) 146 Cal.App.4th 1, 18 [“Mere speculation is not sufficient to establish a risk of physical or emotional harm to a child”]). This assertion ignores the tender years presumption, which rests on the reasonable proposition that children young enough to need constant supervision face an “inherent” and substantial risk of serious physical harm if their caregiving parent is abusing mind-altering drugs that render him less capable of providing the requisite supervision. (*Drake M., supra*, 211 Cal.App.4th at pp. 766-767.) Thus, where this presumption applies, the juvenile court need not wait for the risk of harm to ripen into actual injury (*In re I.J.* (2013) 56 Cal.4th 766, 773 [“The court need not wait until a child is . . . injured to assume jurisdiction . . . ’ [citation omitted]”]); there is no “one free tragedy” rule.

To the extent father is arguing that the children’s good health rebuts the tender years presumption, he is wrong. Legally, the absence of injury cannot be enough to rebut the presumption because, as explained above, such a rule would effectively require proof of an “identified, specific hazard” and proof of actual injury; this would effectively eliminate the presumption. Factually, the only evidence that father identifies

beyond the children's health to rebut the presumption is that the amount of marijuana in his bloodstream was on the decline in the four drug tests conducted immediately prior to the dispositional hearing. Of course, the four tests father cites are decreasing only because the marijuana level reported in the first test of this series was nearly twice as high as the level revealed in the test conducted the week before. More to the point, the tests unequivocally indicate that father is still using marijuana and it is well settled that a period of sobriety—let alone a period of continued but decreased drug use—does not wipe away a longstanding history of drug use. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424; *In re Amber M.* (2002) 103 Cal.App.4th 681, 686-687.) At bottom, the record shows that father uses marijuana to an excess and is “high all the time”; this places him squarely in the heartland of the concerns underlying the tender years presumption.

Second, father contends that *Drake M.*, *supra*, 211 Cal.App.4th 754 and *In re Destiny S.* (2012) 210 Cal.App.4th 999 (*Destiny S.*) require the juvenile court's jurisdictional finding to be overturned. They do not. *Destiny S.* involved an 11-year-old child (*id.* at p. 1004), and thus did not rest on the tender years presumption. *Drake M.* involved a child of tender years, but the court in that case concluded that the parent's medicinal marijuana use did not constitute “substance abuse” within the meaning of section 300, subdivision (b)(1). (*Drake M.*, at pp. 763-770.) Here, father does not contest that his marijuana use constitutes substance abuse. *Drake M.* went on to find that the child was also not at risk due to the parent's medicinal marijuana use because the child was healthy and was never “exposed to marijuana, drug paraphernalia or even secondhand marijuana

smoke.” (*Id.* at pp. 768-769.) Here, father rolled blunts and smoked marijuana in front of the children, and his doing so made his stepson ill.

II. Removal

Father’s challenge to the juvenile court’s removal order rises or falls on his challenge to the court’s substance abuse jurisdictional finding. Because we conclude that the jurisdictional finding is supported by substantial evidence, we also conclude that the finding, especially when combined with the unchallenged finding of domestic violence, constitutes substantial evidence that Emmanuel and Jesus face “a substantial danger to [their] physical health, safety, protection, or physical or emotional well-being” if they were returned to father’s custody; this justifies removal under section 361, subdivision (c). (Accord, *In re Noe F.* (2013) 213 Cal.App.4th 358, 367 [substantial evidence review of removal orders].)

III. Dispositional Case Plan Orders

Father’s challenge to the dispositional case plan requirements that he drug test and attend individual counseling for drug use is justiciable (because, as noted above, it turns on the challenged substance abuse finding), but the trial court did not abuse its discretion in imposing those conditions. (*In re D.C.* (2015) 243 Cal.App.4th 41, 56 [abuse of discretion review].) That is because, as we have concluded above, those requirements are appropriate if the substance abuse finding is valid, and we have so concluded.

DISPOSITION

The orders are affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ